

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 13, 2008 Session

STATE OF TENNESSEE v. CHARLES H. WARFIELD, III

**Direct Appeal from the Circuit Court for Williamson County
No. I-CR092115 Robbie T. Beal, Judge**

No. M2007-02011-CCA-R9-CD - Filed September 18, 2008

The defendant, Charles H. Warfield, III, was indicted on one count of reckless driving, one count of possession of a controlled substance and one count of possession of drug paraphernalia. The defendant applied for pretrial diversion. The District Attorney General denied the defendant's application. The trial court granted the defendant's writ of certiorari. After a hearing, the trial court determined that the prosecutor abused her discretion by denying pretrial diversion. The state argued on interlocutory appeal that the trial court erred by concluding that the prosecutor abused her discretion and by ordering that the defendant be placed on pretrial diversion. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 9; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Russell Heldman, Nashville, Tennessee, for the appellee, Charles H. Warfield, III.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Mary Katherine White, Assistant District Attorney General, for the appellant, State of Tennessee.

OPINION

I. BACKGROUND

The defendant, Charles H. Warfield, III, was indicted on one count of reckless driving, one count of possession of a controlled substance and one count of possession of drug paraphernalia. According to the pretrial investigation report, the indictments against the defendant arose from an incident where the defendant ran a stop sign at the intersection of Mallory Lane and Commerce Way in Brentwood, Tennessee. Officer James Colvin with the Brentwood Police Department activated his blue lights to pull the defendant over. The defendant drove up on the curb in front of Golf

Galaxie before pulling over in a parking space in the Best Buy parking lot and yielding to Officer Colvin.

The pretrial investigation report also indicated that Officer Colvin approached the defendant's vehicle and noticed the strong odor of burnt marijuana coming from the car. After checking, Officer Colvin discovered that the defendant had an outstanding warrant in Franklin County, Tennessee. Officer Colvin arrested the defendant. A search incident to the arrest yielded a pipe with residue, rolling papers and green plant material believed to be marijuana.

The defendant filed an application for pretrial diversion with the District Attorney General's Office. The defendant's application was denied and the prosecutor detailed the factors she considered in reaching her decision in a written letter. The prosecutor stated that with regard to the defendant's criminal history and criminal behavior, the defendant showed disregard for the safety of others by driving his motor vehicle while allegedly impaired. The prosecutor also stated that the defendant lied to the police officer and showed an "initial lack of candor." She acknowledged that the defendant had no criminal record, but she stated that the defendant had an admitted history of prior criminal behavior which made him unsuitable for diversion. Specifically, the prosecutor relied upon the defendant's admitted frequent use of marijuana over the past two years and a prior citation for violation of the underage drinking law.

Next, the prosecutor cited factors pertaining to the defendant's social history. The prosecutor specifically pointed to the defendant's expulsion from Middle Tennessee State University (MTSU) after a period of academic probation as a factor weighing against diversion. The prosecutor acknowledged that the defendant worked approximately thirty-two hours per week and took classes at Columbia State Community College. However, the prosecutor alleged that the defendant was less than candid about the nature of his offense with the individuals who provided letters of reference on his behalf. The prosecutor also stated that part of her decision to deny pretrial diversion stemmed from what she believed to be the defendant's lack of remorse and a perceived "air of entitlement to leniency."

The prosecutor acknowledged that the defendant was in good physical and mental condition, a factor which weighed in favor of diversion. However, the prosecutor concluded her letter by stating that pretrial diversion would be improper and "would not serve the public interest in this case." According to the prosecutor, the defendant failed to appreciate the wrongfulness of his actions. She stated that pretrial diversion would "further justify the defendant's one-sided view of his behavior by mitigating the impact this offense will have on his life, mitigating the seriousness of the offense to the defendant and others." The prosecutor concluded by asserting that the defendant, who coached younger children in wrestling, had not behaved as an appropriate role model and therefore, a grant of pretrial diversion would send the wrong message.

The defendant filed a writ of certiorari seeking review of the prosecution's denial of pretrial diversion. The trial court granted the defendant's writ of certiorari and held a hearing to determine

if the prosecutor committed an abuse of discretion. The court found that the prosecutor abused her discretion by relying on irrelevant factors and by failing to properly weigh relevant factors.

Upon review of the record, it appears that the trial court concluded that the irrelevant factors the prosecutor considered included: (1) an assertion that the defendant was driving impaired when he was not charged with that offense, (2) the prosecutor's perception that the defendant had a sustained intent to lie to the arresting police officer, (3) equation of the defendant's criminal behavior with a criminal record, (4) the prosecutor's reliance upon the defendant's failure to complete his education at MTSU when he was currently working and taking classes at a community college, and (5) the prosecutor's assertion that the young men the defendant worked with would be negatively impacted if he was granted pretrial diversion. The court conceded that the prosecutor's determination that the defendant had "an air of entitlement of leniency" was a judgment only the prosecutor was equipped to make, and therefore the court accepted the prosecutor's evaluation. However, the court concluded with the following statement:

[T]he Court is of the opinion that the way – the [s]tate of the law as it is written now that these are the kind of the cases – again, I'm not being specific enough, these are the cases that the Courts want us to grant pretrial diversion under, misdemeanor offenses committed by young people that did not cause . . . harm to the community at large . . . these are the types of cases that we should be granting pretrial diversion on.

. . . I think the [prosecutor] did her job in doing the letter. I think her methodology was correct. But I think the facts that she had based her decision on in the letter to both the defense counsel and the Court, are based primarily on irrelevant factors that the Court, while it may be her job to consider, the Court is unwilling to consider and make him ineligible for diversion.

Having said that, pursuant to 40-15-105(b)(3), the Court believes that it is inclined to grant diversion for the young man and to enter him into a term of diversion and instruct the District Attorney's Office to enter him into a term of diversion based upon the District Attorney's Office[s] abuse of discretion.

Following the trial court's decision and pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, the state applied for and was granted permission for an interlocutory appeal to this court.

II. ANALYSIS

The state's sole issue on appeal is that the trial court erred by concluding that the prosecutor abused her discretion and by ordering that the defendant be placed on pretrial diversion.

To be eligible for pretrial diversion, a defendant must not have been previously granted diversion; must not have a prior misdemeanor conviction for which a sentence of confinement was

served or a prior felony conviction within a five-year period after completing the sentence or probationary period for the conviction; and must not have been charged with a Class A felony, a Class B felony, certain Class C felonies, a sexual offense, driving under the influence, or vehicular assault. *See* Tenn. Code Ann. § 40-15-105(a)(1)(B)(i)(a)-(c). However, statutory qualification for pretrial diversion does not give rise to automatic entitlement. *See State v. Bell*, 69 S.W.3d 171, 176 (Tenn. 2002); *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999). Rather, the decision to grant or deny pretrial diversion rests within the sound discretion of the prosecuting attorney. *Bell*, 69 S.W.3d at 176. When making a determination of eligibility for pretrial diversion, the prosecutor should focus on the defendant's amenability to correction. *Id.* In other words, the prosecutor should focus on any factors which accurately reflect the likelihood that a particular defendant will or will not become a repeat offender. *Id.* Among the factors the prosecutor should consider when making this decision are: (1) the likelihood that pretrial diversion will serve the ends of justice, as well as both the defendant's and the public's interest; (2) the circumstances of the offense; and (3) the defendant's criminal record, social history, and physical and mental condition where appropriate. *See id.* (citing *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983)).

Although it is the defendant's responsibility to demonstrate suitability for pretrial diversion, the prosecutor is not relieved from the obligation of examining and considering all relevant factors. *Id.* at 177. In fact, when denying pretrial diversion, the prosecutor must discuss in writing all relevant factors considered and the weight attributed to each factor. *Id.*; *Curry*, 988 S.W.2d at 157. Moreover, the prosecutor's written denial statement must identify any factual discrepancies between the evidence relied upon by the prosecutor and the evidence presented by the defendant. *Curry*, 988 S.W.2d at 157. Failure to consider and articulate all of the relevant factors constitutes an abuse of discretion. *See id.*

If the defendant's application for pretrial diversion is denied, the defendant may appeal to the trial court for a writ of certiorari. Tenn. Code Ann. § 40-15-105(b)(3). However, the decision of the prosecutor to grant or deny pretrial diversion is presumptively correct and will not be set aside absent abuse of discretion. *Curry*, 988 S.W.2d at 158. When reviewing for abuse of discretion, the trial court must consider only the evidence considered by the prosecutor. *Id.* The trial court may not re-weigh the evidence or substitute its view for that of the prosecutor. *State v. Yancey*, 69 S.W.3d 553, 559 (Tenn. 2002). A certiorari review by the trial court requires a review of the method used by the prosecutor, but not the intrinsic correctness of the prosecutor's denial decision. *See id.* at 558-59.

In evaluating whether there has been an abuse of discretion, the trial court must determine whether the prosecutor has weighed and considered all of the relevant factors or whether the prosecutor reached a decision not supported by substantial evidence in the record. *Bell*, 69 S.W.3d at 179; *see also Yancey*, 69 S.W.3d at 559. The trial court cannot reasonably conclude that there exists substantial evidence supporting the prosecutor's decision if the prosecutor failed to consider all of the relevant factors and their relative weight. *Bell*, 69 S.W.3d at 179. Moreover, the prosecutor's "failure to consider all relevant factors, including evidence favorable to the defendant, cannot be cured by the trial court's review." *Id.* at 178. Our supreme court has determined that a

prosecutor may abuse his discretion by failing to consider certain factors favoring diversion, while considering other irrelevant factors in order to deny diversion. *See State v. McKim*, 215 S.W.3d 781 (Tenn. 2007).

The trial court may conduct a hearing, but only to resolve any factual disputes raised by the prosecutor or the defendant. *Curry*, 988 S.W.2d at 158. The trial court may not discuss new or additional considerations regarding the denial of diversion, or “fill-in the gaps” absent appropriate findings by the prosecutor. *Yancey*, 69 S.W.3d at 559; *Curry*, 988 S.W.2d at 158. “On appeal, the appellate court is bound by factual findings made by the trial court unless the evidence preponderates against them.” *Bell*, 69 S.W.3d at 177. In other words, appellate review is limited to considering only the evidence considered by the prosecutor. *See Yancey*, 69 S.W.3d at 559-60.

Upon review of the record, we conclude that the prosecutor considered all of the relevant *Hammersley* factors but abused her discretion by placing undue weight and emphasis on factors irrelevant to an overall consideration of the defendant’s amenability to correction. Specifically, the prosecutor emphasized criminal behavior admitted to by the defendant, including drug use and a prior violation of the underage drinking law, even though she acknowledged that the defendant had no criminal record. Similarly, even though the defendant was not charged with driving while impaired and there was no evidence showing that the defendant was impaired, the prosecutor asserted that “the defendant should not have been driving a motor vehicle due to impairment. Driving around getting high demonstrates willful disregard for the safety of others.” Additionally, in evaluating the defendant’s social history, the prosecutor effectively disregarded the fact that at the time of arrest, the defendant was working thirty-two hours per week and taking classes at a local college. Instead, she focused on the defendant’s prior poor performance and subsequent expulsion from MTSU. The prosecutor also presumed that the defendant possessed a sustained intent to lie to the arresting police officer, an assertion the trial court concluded was not supported by the evidence. Based on the weight and emphasis the prosecutor placed on those irrelevant factors, we conclude that the trial court did not err by determining that the prosecutor abused her discretion in denying the defendant pretrial diversion.

Tennessee Code Annotated 40-15-105(b)(3) grants the trial court authority to place a defendant on pretrial diversion “[i]f the trial court finds that the prosecuting attorney has committed an abuse of discretion in failing to divert.” Generally, if the trial court determines that the prosecutor failed to consider and weigh all relevant factors, the trial court must reverse the prosecutor’s decision and remand for further consideration of all factors. *See Bell*, 69 S.W.3d at 180. However, where the trial court concludes that the prosecutor “has considered all relevant factors, and no irrelevant ones, and has nonetheless committed an abuse of discretion in denying diversion, the trial court may order the prosecutor to place the defendant on pretrial diversion.” *McKim*, 215 S.W.3d at 788 n. 3; *see also State of Tennessee v. Tony Galtelli, John B. Gardner, and Vance Plumoff*, No. W2006-00526-CCA-MR3-CD, 2008 WL 427257 at *8 (Tenn. Crim. App. at Jackson, Feb. 13, 2008).

Applying the rule stated above, we conclude that the trial court did not err by placing the defendant on pretrial diversion. The trial court stated that even though the prosecutor employed the proper methodology, she based her decision “primarily on irrelevant factors.” We agree. The instant case is therefore distinguishable from *Bell*. In that case, the trial court concluded that the prosecutor failed to consider all of the relevant factors, and therefore remand was appropriate. *See Bell*, 69 S.W.3d at 180. In the instant case, the prosecutor considered all of the relevant factors under a *Hammersley*-type analysis, but nonetheless proceeded to base her decision upon improperly weighted or irrelevant factors. Remanding the decision to the prosecutor for consideration under the procedure identified in *Bell* would not achieve a different result. Accordingly, we conclude that the trial court did not err by ordering the defendant placed on pretrial diversion. Therefore, the state is without relief as to this issue.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE